

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:13-CV-00949**

DAVID HARRIS; CHRISTINE BOWSER; and SAMUEL LOVE,

Plaintiffs,

v.

PATRICK MCCRORY, in his capacity as Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections,

Defendants.



**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF ADMISSION OF
PLAINTIFFS' EXHIBIT 13**

Plaintiffs submit the following memorandum in support of the admission of Plaintiffs' Exhibit 13 into evidence. The exhibit, as the Court will recall, is an email marked "attorney-client privileged" and is addressed between and among several lawyers and individuals, including Dr. Hofeller, the "primary architect" of the congressional districts at issue in this litigation. Defendants have objected to the admission of the exhibit on the grounds of the attorney-client privilege. Plaintiffs respectfully submit that whatever privilege may or may not have attached to this document was waived by the prior publication of the document by its filing in a public court file at least three times, twice in the North Carolina state courts and once in this Court.

Plaintiffs submit this memorandum to provide the Court with an evidentiary foundation for the admission of Plaintiffs' Exhibit 13.

Plaintiffs' Exhibit 13 is a copy of Exhibit 564 from the deposition of Dr. Thomas Hofeller in *Dickson v. Ruch*. See Declaration of John W. O'Hale ("O'Hale Decl."), Ex. 1 (the "E-Mail String"). Dr. Hofeller's deposition was taken over two days, on June 28, 2012, and August 10, 2012. O'Hale Decl., ¶ 1.

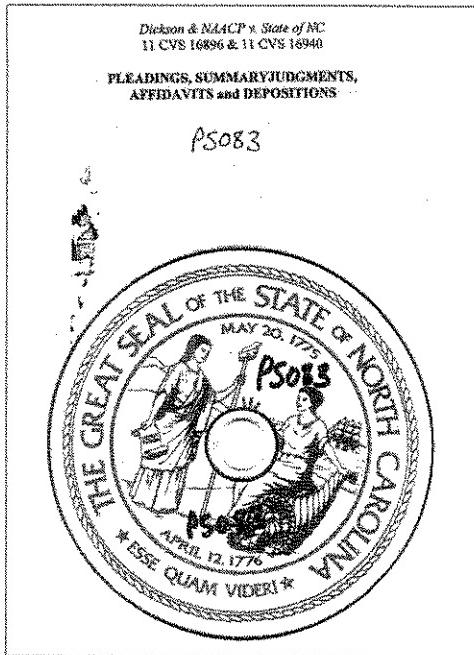
Defendants subsequently submitted a copy of the E-Mail String to the North Carolina Superior Court on a disc on February 25, 2013, at a summary-judgment hearing in the state court

Dickson litigation. At the hearing, Defendants' counsel stated as follows:

2 trying to kind of pare it down for you. We've put
3 together what we've been referring to as the "library" on
4 this case. One of those discs has the pleadings, the
5 amended complaint to the answers. It has the motions for
6 summary judgment. It has all of the briefs on summary
7 judgment.
8 JUDGE RIDGEWAY: Both sides?
9 MR. PETERS: Both sides. It has the --
10 all of the affidavits and it has all of the depositions.

O'Hale Decl., Ex. 2 (excerpt from transcript).

Plaintiffs have reproduced below an image of Defendants' disc, which contained the E-Mail String. (Plaintiffs' counsel previously added the number "PS83" to the disc for internal recordkeeping purposes.)



The disc that defendants filed on February 25, 2013, contained a copy of Dr. Hofeller's deposition transcript, including the E-Mail String. Plaintiffs have reproduced below, for the convenience of the Court, a series of screenshots showing where the E-mail String appears on Defendants' February 25, 2013 disc.¹

Name	Date modified	Type	Size
Affidavits	9/11/2013 10:45 AM	File folder	
Depositions	9/11/2013 10:49 AM	File folder	
Pleadings	9/11/2013 10:50 AM	File folder	
Summary Judgment	9/11/2013 10:48 AM	File folder	

Name	Date modified	Type
30b6 League of Women Voters Nicholas ...	9/11/2013 10:52 AM	File folder
30b6 NC A Philip Randolph Institute Mon...	9/11/2013 10:51 AM	File folder
30b6 NC State Conf Branch of NAACP Ba...	9/11/2013 10:52 AM	File folder
Arlington Deposition	9/11/2013 10:53 AM	File folder
Bartlett Deposition	9/11/2013 10:47 AM	File folder
Brunell Depositions	9/11/2013 10:47 AM	File folder
Churchill Deposition	9/11/2013 10:48 AM	File folder
Collicutt (Guilford BOE) Deposition	9/11/2013 10:49 AM	File folder
Doss (Guilford BOE) Deposition	9/11/2013 10:47 AM	File folder
Exhibits	9/11/2013 10:50 AM	File folder
Fairfax Deposition	9/11/2013 10:46 AM	File folder
Fedorowitz Deposition	9/11/2013 10:46 AM	File folder
Frey Deposition	9/11/2013 10:46 AM	File folder
Hall Deposition	9/11/2013 10:46 AM	File folder
Hofeller Deposition	9/11/2013 10:46 AM	File folder
Holmes Deposition	9/11/2013 10:47 AM	File folder
Ketchie Deposition	9/11/2013 10:47 AM	File folder
Lewis Deposition	9/11/2013 10:47 AM	File folder
Morgan Deposition	9/11/2013 10:46 AM	File folder
Oldham Deposition	9/11/2013 10:47 AM	File folder
Perry Deposition	9/11/2013 10:46 AM	File folder
Peterson Deposition	9/11/2013 10:47 AM	File folder
Poucher Deposition	9/11/2013 10:47 AM	File folder
Raupe Deposition	9/11/2013 10:46 AM	File folder
Reed Deposition	9/11/2013 10:46 AM	File folder
Robertson Deposition	9/11/2013 10:46 AM	File folder
Rucho Deposition	9/11/2013 10:46 AM	File folder
Sims Deposition	9/11/2013 10:46 AM	File folder

Name	Date modified	Type	Size
Exhibits 504-506	9/11/2013 10:51 AM	File folder	
NAACP - Hofeller 429 - 464	9/11/2013 10:51 AM	File folder	
2-Thomas_Hofeller	8/21/2012 5:44 PM	Adobe Acrobat D...	1,435 KB
T_Hofeller-Transcript	7/7/2012 2:42 PM	Adobe Acrobat D...	1,413 KB

NAACP - 558	8/12/2012 8:42 PM	Adobe Acrobat D...	1,696 KB
NAACP - 559	8/12/2012 8:42 PM	Adobe Acrobat D...	1,097 KB
NAACP - 560	8/12/2012 8:42 PM	Adobe Acrobat D...	1,753 KB
NAACP - 561	8/12/2012 8:43 PM	Adobe Acrobat D...	1,144 KB
NAACP - 562	8/12/2012 8:43 PM	Adobe Acrobat D...	199 KB
NAACP - 563	8/12/2012 8:47 PM	Adobe Acrobat D...	879 KB
NAACP - 564	8/12/2012 8:47 PM	Adobe Acrobat D...	177 KB
NAACP - 565	8/12/2012 8:49 PM	Adobe Acrobat D...	229 KB
NAACP - 566	8/12/2012 8:49 PM	Adobe Acrobat D...	93 KB

¹ These screenshots are taken from Plaintiffs' archive—not directly from the original disc—so some of the “last modified” dates are later than 2/25/13, depending on when the files were last copied.)

A copy of Defendants' February 25, 2013, disc was also made a part of the *Dickson* record on appeal and was filed with the North Carolina Supreme Court on September 3, 2013, as part of the Rule 9(d) Exhibits on DVD. A copy of the N.C. Supreme Court DVD is reproduced below. See O'Hale Decl., Ex. 3 (*Dickson* Rule 9(d) Exhibits at 7726).

- Doc. Ex. 7726 -

Contents of Disc (DVD) Filed With Exhibits

A DVD is being filed as part of the Exhibits filed in this matter. The DVD contains files in native format, arranged in the following file directories:

Affidavits

CDs;

Correspondence With Court;

Memoranda of Law;

Motions

Notices;

Orders;

Pleadings;

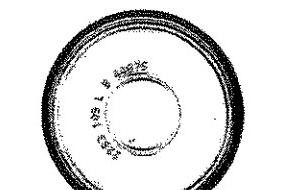
Powerpoint Files for MSJ Hearing;

Pre-Trial and Trial Materials; and

Stipulations.

A copy of the DVD label is below.

Materials Filed in Conjunction With
Record on Appeal and Rule 9(d) Exhibits
(Doc. Ex. 7726)



Dickson et al. v. Rucho et al.
11-CVS-16896 (Wake Co.)

NC NAACP v. State of North Carolina
11-CVS-16940 (Wake Co.)

On that DVD, Defendants' February 25, 2013 disc appears at \Native Format\CDs\PS83\

On July 1, 2015, the parties filed a copy of the entire *Dickson* record DVD with the M.D.N.C. in *Harris v. McCrory*, 1:13-cv-00949-WO-JEP.

As stated in Notice of Filing (ECF 95) (Attachment 4):

Pursuant to the Court's May 7, 2015 Scheduling Order (ECF Doc. No. 91), the parties hereby give notice of their filing of a copy of the state-court record in *Dickson, et al. v. Rucho, et al.*, No. 201PA12-2 (N.C. Supreme Court) ("Dickson"), which is attached hereto.

The *Dickson* Plaintiffs' and Defendants' respective proposed findings of fact and conclusions of law appear in the Record on Appeal at the following pages:

- For Plaintiffs, at pp. 1032 to 1164; and
- For Defendants, at pp. 1165 to 1256.

A disc containing the foregoing materials (as well as the N.C. R. App. Pro. 9(d) Exhibits and materials filed with the North Carolina Supreme Court in native format) is being transmitted to the Court via Federal Express.

The only difference between this Court's copy of the DVD (as compared to the DVD filed with the N.C. Supreme Court) is that this Court's copy included an extra folder labeled "Correction to Record." (That correction related to a PowerPoint file that is not relevant here.)

On the DVD filed with this Court, the E-Mail String is located at:

\Native Format\CDs\PS83\Depositions\Hofeller Deposition\Exhibits 504-566\NAACP - 564.pdf

Plaintiffs respectfully submit that Plaintiffs' Exhibit 13 has lost whatever privilege that may have once attached to this document by virtue of its public disclosure and its repeated filing with the state and federal courts of North Carolina. *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46 (M.D.N.C. 1987) (stating that “[d]isclosure which is inconsistent with maintaining this confidentiality waives the privilege not only as to the specific communication but to other communications relating to that same subject matter” and holding that the attorney-client privilege had been waived).

For these reasons, Plaintiffs respectfully ask the Court to admit Plaintiffs' Exhibit 13 as a trial exhibit.

Respectfully submitted, this the 15th day of October, 2015.

PERKINS COIE LLP

/s/ Kevin J. Hamilton
Kevin J. Hamilton
Washington Bar No. 15648
Khamilton@perkinscoie.com
William B. Stafford
Washington Bar No. 39849
Wstafford@perkinscoie.com
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8741
Facsimile: (206) 359-9741

John M. Devaney
D.C. Bar No. 375465
JDevaney@perkinscoie.com
Marc E. Elias
D.C. Bar No. 442007
MElias@perkinscoie.com
Bruce V. Spiva
D.C. Bar No. 443754
BSpiva@perkinscoie.com
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

Attorneys for Plaintiffs

POYNER SPRUILL LLP

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.
N.C. State Bar No. 4112
espeas@poynerspruill.com
John W. O'Hale
N.C. State Bar No. 35895
johale@poynerspruill.com
Caroline P. Mackie
N.C. State Bar No. 41512
cmackie@poynerspruill.com
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Telephone: (919) 783-6400
Facsimile: (919) 783-1075

Local Rule 83.1
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO ADMIT PLAINTIFFS' EXHIBIT 13** to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

This the 15th day of October, 2015.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.